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IN THE

Supreme Court of the United States

October Term, 1936

No. 39

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' BRIEF

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Dated August 27, 1936.

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Opinion Below

A District Court, specially constituted under Section 266 of the Judicial Code, as amended, (U.S.C.A. Title 28, Sec. 380) for the District of Montana, Billings Division, on February 3, 1936, rendered an opinion sustaining Appellees' motion to dismiss Appellants' suit, brought to enjoin as unlawful and confiscatory, a valuation and rate order of the Public Service Commission of Montana and seeking interlocutory and permanent injunctions against said order. The memo. opinion of the District Court appears at R. 40, and the

prior opinion of that court, adopted for disposition of the instant suit, is reported in 12 F. Supp. at p. 946. Thereafter, the court entered its decree dismissing the suit (R. 44) and the complainant has appealed therefrom.

Application for stay pending appeal was made to the lower court (R. 41) and was denied (R. 43). Application was then made direct to this court for such stay and on May 7, 1936, and after oral argument, this court issued its injunction restraining the order of the Public Service Commission here involved, pending determination of this appeal or until further order.

Statutes (and Order) Involved

(a) This suit is one involving the validity of a formal valuation and rate order of the Public Service Commission of the state of Montana, with respect to appellants' electric system in the Forsyth, Montana district. The order is too lengthy to insert here but is set out in full at R. 17.

(b) Section 3906 Revised Codes of Montana, 1921:

> "Action to set aside rates or charges fixed by commission. Any party in interest being dissatisfied with an order of the *commission* (Public Service Commission) fixing any *rate or rates*, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to *vacate and set aside* any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order,

is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

"All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be *tried and determined* as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to said commission.

"No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon; provided, that *all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction.*

"If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same, and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice, or service complained of in said ac-

tion, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal or take the case up on error as in other civil actions. Where an appeal is taken to the supreme court of Montana, the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

"In all actions under this act, the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be." (Italics and matter in parenthesis ours).

(c) The Johnson Act (Act of Congress, May 14, 1934, U.S.C.A., Title 28, Sec. 41 (1), added to Sec. 24 of the Judicial Code a proviso reading as follows:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political

subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, *and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.*" (Italics ours.)

(d) Sec. 4038 Revised Codes of Montana, 1921, as amended by laws of 1931, Chapt. 194:

"Any interested person, who has appeared, copartnership, association or corporation being dissatisfied with any finding, findings or decision of the *Commissioner* (Investment Commissioner) made in accordance with the provisions of *this Act,* may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as defendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The *rules of pleading and procedure* in such action shall be the same as provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may *set aside, modify or confirm* said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and

pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding.

"Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear." (Italics and matter in parenthesis ours).

(e). Sec. 9243, Revised Codes of Montana, 1921:

"Injunction Order—When Granted. An injunction order may be granted in the following cases:

1. When it shall appear by the complaint by the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff;

3. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

4. When it appears by affidavit that the defendant, during the pendency of the action, threatens, or is about to remove or dispose of his property,

with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition."

(f) Section 266 of the Judicial Code, as amended:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the

complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(g) Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This court has jurisdiction of the instant appeal by reason of the provisions of Section 266 of the Judicial Code ante, in that this is a direct appeal from an order of a statutory court denying, after notice and hearing, an interlocutory injunction involving the constitutionality of a rate order of the Public Service Commission of Montana. The amount directly in controversy is the difference between the existing rates and the reduced rates as ordered by the Public Service Commission, which, in this case, amounts to $9,076.00 per year, R. 50.

Statement of the Case

On September 23, 1935, the Public Service Commission of Montana entered its report and order No. 1668 fixing the value for rate making purposes of the appellants electric system in Forsyth, Montana district (R. 17-22) at approximately *two-thirds its assessed value* for taxing purposes (R. 49), and directing the appellant to file with the Commission on or before October 1, 1935, (effective as of October 1, 1935, a revised schedule of rates (R. 19-22) under which, the allowable operating expenses, taxes and depreciation would sub-

stantially *exceed the gross revenue* (R. 9, 10, 18, 27) with *nothing for interest or return* on the investment.

On October 1, 1935, appellant filed in the Federal District Court for Montana its suit in equity seeking to restrain as unlawful and confiscatory the report and order of the Commission above referred to (R. 1).

The bill of complaint alleged: diversity of citizenship; the requisite amount in controversy; immediate, substantial, daily and continuing confiscation; that the laws of Montana (Sec. 3906, ante) prohibit the courts of that state from issuing an injunction pendente lite to restrain the enforcement of the said rate order; and that the complainant had no plain, speedy or efficient (adequate) remedy at law or in equity in the courts of the state, nor otherwise except by resort to the Federal District Court to protect it against such confiscation, (R. 1-16).

The defendants (appellees here) filed a motion to dismiss the suit upon the grounds:

(a) that the Federal District Court was without jurisdiction to entertain the suit or make any order therein, and,

(b) that the bill of complaint did not state facts sufficient to constitute a cause of action in that court (R. 36 and 37).

The appellees did not argue the second ground (sufficiency of the facts) and the lower court gave it no consideration in its opinion (R. 40).

The statutory court, consisting of Judge Haney of the Circuit Court of Appeals, and District Judges

Pray and Baldwin, granted the motion to dismiss (R. 40) and entered a decree dismissing the suit (R. 44), upon the ground that it was without jurisdiction by reason of (a) the Johnson Act ante, (b) the ruling of this court in *Porter v. Investors Syndicate,* 286 U.S. 461 (1932), and (c) the lower court's own prior decision in *Montana Power Company v. Public Service Commission of Montana, et al,* reported in 12 F. Supp. at p. 946.

Assignments of Error

The District Court erred and abused its discretion in the following respects:

1. In refusing to grant an interlocutory injunction where the admitted allegations of the bill of complaint and the undisputed affidavits filed therewith clearly disclosed substantial, daily and continuing confiscation of complainant's property and that the damage complainant will suffer, if the Commission order is permitted to become presently effective, will be irreparable.

2. In holding that the laws of the State of Montana afford appellant "a plain, speedy and efficient remedy at law or in equity," in the courts of the state, within the meaning of the Johnson Act, ante.

3. In holding that the Johnson Act divested the District Court of its jurisdiction in a confiscation case where the State statute denies stay or supersedeas pending final determination.

4. In holding Section 3906 Revised Codes of Montana, 1921, to be unconstitutional.

5. In holding the decision in *Porter v. Investor's*

Syndicate, ante, to be authority for or a "direction" to, so construe the said Section 3906.

6. In construing the decision in *Porter v. Investor's Syndicate,* ante, as giving appellant a clear right to stay pending final determination in the state courts of Montana.

7. In sustaining the motion to dismiss for alleged lack of jurisdiction.

8. In refusing to issue the interlocutory injunction as prayed for.

SUMMARY OF ARGUMENT

The position and contention of appellant was and is: (a) that the Johnson Act, ante, does not remove from the Federal District Courts jurisdiction in cases such as this but specifically retains such jurisdiction, where it appears the state law does not provide a plain, speedy and efficient or adequate remedy to protect against substantial, daily and continuing confiscation; (b) that the laws of Montana do not provide such a remedy,—but on the contrary such laws (Section 3906 ante) expressly denied appellant an injunction pendente lite; (c) *Porter v. Investors' Syndicate,* ante, used as the basis of decision by the lower court, is a *Prentis* case (211 U.S. 210). The rule in the *Prentis* case is not applicable because the courts of the state of Montana are not given authority to exercise a legislative function with respect to Public Service Commission rate orders,—they may only "vacate or set aside,"—they *cannot* revise or modify such orders; (d) *Porter v. Investors' Syndicate, ante,* is not applicable in the instant suit because it is based upon other and materially dissimilar state statutes, i. e.,

statutes giving the state courts legislative powers and functions with respect to orders of the officer there involved and making available stay or supersedeas under the general laws of the state; (e) neither of the powers referred to in (d) are present in the instant suit or appeal; (f) the rule announced in *Pacific Telephone & Telegraph Company v. Kuykendall*, 265 U. S. 196, is controlling of the issue here presented; (g) Appellant was under no obligation to have the constitutionality of Section 3906, ante determined, before seeking relief in a Federal court.

(A)

The Johnson Act, Does Not Divest This Court of Jurisdiction in The Instant Case

The Johnson Act specifically retains in the Federal District Courts, jurisdiction in suits such as the instant one where a plain, speedy and efficient remedy is not provided in the courts of the State. The language and unequivocal intent of Section 3906, Revised Codes of Montana, 1921, calls for no argument, construction or illustration to determine its plain meaning. It says clearly that the courts of the state are prohibited from issuing an injunction *pendente lite* with respect to rate reduction orders of the Public Service Commission of Montana.

While no direct challenge to the constitutionality of Section 3906, ante, has been presented to the Supreme Court of Montana, that court has on more than one occasion given consideration to, quoted, and applied the prohibition therein contained.

The section was quoted in *Billings Utility Co. v.*

Public Service Commission, 62 Mont. 1, 203 Pac. 366 (1921), and this comment made:

> "The rates fixed, as by the statute directed, are *prima facie* lawful, can be attacked in court on the sole ground that they are unlawful or unreasonable, shall be deemed reasonable and just *until final determination* by the courts and the burden of proof rests on the party antagonizing the order."

The section was again considered in *State ex rel. Public Service Commission v. Great Northern Utilities Co.,* 86 Mont. 442, 284 Pac. 772 (1929), and this comment made:

> "the statute *prohibits the court* in such an action *from issuing an injunction pendente lite* and declared that the 'rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction (Secs. 3905 and 3906, Rev. Codes 1921), and Sec. 3911 Id., specifically authorizes mandamus proceedings to compel obedience to the orders issued." (Italics ours.)

The Board of Railroad Commissioners of Montana is, ex officio, the Public Service Commission of Montana (Section 3880, Revised Codes of Montana, 1921). In the act creating the parent board there is found Section 3809 Revised Codes of Montana, 1921 (formerly Section 4390 Revised Codes, 1907) reading in part, as follows:

> "That *until the final decision* in any such action the classification, rate, toll, charge, regulation or *order of the board* affecting rates or charges *shall be deemed to be final and conclusive*: And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls,

charges, regulations and orders made, fixed and established by said board shall prima facie be deemed to be just, reasonable and proper." (Italics ours.)

These provisions were directly examined by the Supreme Court of Montana in *State ex rel. Board of Railroad Commissioners v. District Court,* 53 Mont. 229, 233, 163 Pac. 115 (1917), and this conclusion expressed:

> "Provisos to the same effect are found in Section 4391. They are not expressed in the most apt and appropriate terms; yet it is *obvious,* we think, that it was the purpose of the legislature in enacting the first to *restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment;* while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. *The effect* of the first *is to take from the court all power of control over any order relating to rates and charges except by final judgment. This necessarily deprives a* railroad *company* as well as the shipper, *of the right* to invoke, and *prohibits the court from issuing a preliminary injunction in this behalf.*" (Italics ours.)

We do not believe it was the intention of either the framers of the Johnson Act nor of the Congress that that Act would deny to a citizen, his rights under the federal constitution nor his resort to this court in situations such as are presented by the instant suits wherein it is so apparent the state process is inadequate to afford relief.

Probably the best evidence of this is a statement of

the Honorable John E. Benton, of Washington, D. C., General Solicitor of the National Association of Railroad and Utility Commissioners, an organization which embraces within its membership the members of the State Public Service Commissions. As disclosed by the printed report of the hearings of the Judiciary Committee of the House of Representatives of the 73rd Congress, Second Session, Mr. Benton appeared on February 27, 28 and March 1, 1934, and supported this bill as the representative of the State Commissions. (U. S. Government Printing Office Document 45,740, at p. 216-217), Mr. Benton testified as follows:

> "In the brief filed on behalf of the Commonwealth Edison Co., the Peoples Gas Light Co. of Chicago, and various other utilities, the following assertion was made on page 6:
>
> " 'The fact is, as brought out later in this memorandum, that adequate relief against confiscation cannot under the statutes of many, and perhaps most, States, be obtained by a utility during the process of appeal from a commission order through the state courts.'
>
> "The later statement in the brief, referred to in the quotation just made, appears on page 8:
>
> " 'The State Courts cannot, except in a few instances where they are given legislative authority in rate cases, grant by injunction any affirmative relief to the utility from the confiscatory order of the commission.'
>
> "Similar statements have been made during the hearing by other utility counsel.
>
> * * * * * *
>
> "Perhaps the shortest answer to make to this astonishing assertion of utility counsel, however, is that *by the plain terms of this bill, it will not be*

applicable in any state *where the courts* of *the state do not exercise jurisdiction to restrain confiscation.* The bill is to apply only in states where a 'plain, speedy and efficient remedy' may be had in the state courts.

"The construction of this bill, if it becomes a law, and the determination whether the facts in any case, under the law as construed, are such that the act applies, *will be for the Federal District Courts,* with appeal to the United States Supreme Court. *The right to be protected against confiscation of property is a constitutional right.* The act recognizes that a utility suffering violation of any constitutional right is entitled to a speedy remedy, and reserves jurisdiction to the Federal courts to protect it, *if in any state,* the state courts are *disabled to protect it.* In whatever states, if any, the state courts in fact are without power to give a 'plain, speedy and efficient remedy,' *this act will not apply;* and *the jurisdiction of the United States district courts, as now existing, will continue to be exercised.*" (Italics ours.)

Sec. 3906, supra, is and was a part of Chapter 52 of the 1913 Session Laws of Montana. Chapter 52 enlarged the functions of the Railroad Commission of Montana and created the Public Service Commission, giving it jurisdiction with respect to the valuation and rates of electric and other utility companies, which it had not theretofore had or exercised.

Section 3880, Revised Codes of Montana, 1921, was Section 2 of said Chapter 52. Section 3880, in part, reads as follows:

"The Board of Railroad Commissioners of the state of Montana shall be ex-Officio the Public Service Commission hereby created, and for the purpose of this act shall be known and styled 'Pub-

> lic Service Commission of Montana.' * * * "and in the name as above set forth, it may sue and *be sued in the courts* of the state and *of the United States.* * * *" (Sec. 2, Ch. 52, Laws '13.) (Italics ours.)

The quoted sections (3880 and 3906) being parts of the same act, and not having been amended or repealed, argue strongly the Montana legislative intent (in 1913 and today, 1936) that a public utility should, at its election, have the right to proceed in either the state or Federal court. Section 3880, supra, contains no provision that suits against the Commission in Federal court are limited to any particular class or character of suit or issue.

The Johnson Act, ante, was passed May 14, 1934. The regular session of the Montana legislature convened and adjourned during the early months of 1935, without amending or repealing either of these sections. (Montana Session Laws, 1935.)

These two state laws, one denying appellant an injunction *pendente lite* on appeal from an admittedly confiscatory rate order, and the other authorizing the Public Service Commission to be sued in Federal court, compels the conclusion the legislature of Montana intentionally sought to supply a deficiency in Montana law (as measured by the Federal requirement of a plain, speedy and efficient remedy in confiscation cases) by inviting resort to the Federal courts.

This court has not had occasion, since the passage of the Johnson Act, to pass upon situations such as are here presented. It did, however, consider the Johnson Act in *Corporation Commission of Oklahoma, et al. v. Carey, Trustee,* 296 U. S. 452. This case was re-

ported below in 9 F. Supp. at page 709.

Prior to the Johnson Act, the District Court of the United States, constituted as required by Section 266 of the Federal Judicial Code, as amended, had jurisdiction of any case involving the reasonableness or confiscatory character of rates prescribed by a state administrative board, provided the requisite jurisdictional amount was in controversy and provided further that the legislative process of prescribing rates had been completed. Such jurisdiction existed without reference to any remedy at law or in equity being available in the state courts to suspend the operation of such rates pending a judicial review.

Prendergast v. *New York Telephone Co.*, 262 U. S. 43,
Bacon v. *Rutland R. Co.*, 232 U. S. 134,
Love v. *Atchison T. & S. F. Ry. Co.*, 185 Fed. 321.

Neither the Johnson Act, nor any other act of Congress can, so long as we have provision in our constitution for the protection of property rights, take from a citizen his right to protection against the confiscation of his property.

The only present method of securing such protection is by resort to the courts. Since the laws of Montana deny such right he has recourse only to a federal court.

(B)

The Decision in Porter v. Investors Syndicate, 286 U. S. 461, Is Neither Applicable Nor Controlling Here.

Appellees, in argument and brief, have stated their

reliance upon the decision in the Porter case, ante, as decisive and controlling of the issue here presented. The Statutory Court adopted appellee's argument and based its decision squarely and solely upon an interpretation of the Johnson Act, ante, and the decision in the Porter case.

The Statutory Court said, (*Montana Power Company v. Public Service Commission of Montana, et al,* 12 F. Supp. at p. 951):

> "if the Supreme Court were to write a *decision for our guidance* in the interpretation of Section 3906, considered in connection with the Johnson Act, it could not do so more pointedly and effectually than it has done in the *Porter* case, and it cites the identical state statute to which recourse could be had by complainants for a stay of the commission's order, viz: Section 9243, which reads: 'Injunction Order—When Granted: An injunctive order may be granted in the following cases:
>
> " '1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief, or any part thereof necessary in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;'
>
> " '2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.' "

We respectfully differ with the three-judge court in their interpretation of the *Porter* case, ante, and the application of the statutes of Montana referred to in that case.

The facts of the *Porter case* were these. The Investors' Syndicate was an investment concern licensed to

do business in Montana pursuant to a Blue Sky Law effective in 1930. The Syndicate had built up a considerable business under the authority of its license. The Montana state officer charged with the duty of granting and revoking such licenses promulgated a rule which would seriously interfere with the Syndicate's business and in that connection asserted his intention to revoke the Syndicate's license if it failed to obey the rule. The Syndicate thereupon filed its Bill in the Federal District Court seeking to enjoin the state officer from revoking the license for failure to comply with the order. A specially constituted court was convened under the provisions of Section 266, Judicial Code, and upon hearing before such court an injunction was granted. The case came to the Supreme Court of the United States by direct appeal. This court reversed the District Court upon the ground the Syndicate had failed to exhaust its administrative remedy under state law before applying to the Federal District Court for injunctive relief.

The *first* ground of the decision to be specially noted is that with respect to the sort of administrative order dealt with in the case. The portion of the decision pertinent to this matter reads as follows (286 U. S. at p. 468):

> "The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge '*may set aside, mod-*

ify or confirm said . . . decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely *judicial,* that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to *modify* or to affirm the commissioner's orders, as the proofs may require. *The legislative process remains incomplete until the action of that court shall have become final.* Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 229, 230, 53 L. Ed. 150, 160, 29 S. Ct. 67; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 444, 450, 451, 60 L. Ed. 1084, 1095, 1097, 1098, 36 S. St. 637. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. Keller v. Potomac Electric Power Co., 261 U. S. 428, 438-442, 67 L. Ed. 731, 734-736, 43 S. Ct. 445. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order."

"The *present case* is not one in which the review of the commissioner's action is *judicial* in character. *If it were* the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts *is not bound to pursue a judicial review* in the state courts would apply. See Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. Ed. 538, 34 S. Ct. 283; Prendergast v. New York Teleph. Co., 262 U. S. 43, 67 L. Ed. 853, 43 S. Ct. 466; Railroad & Warehouse Commission v. Du-

luth Street R. Co., 273 U. S. 625, 71 L. Ed. 807, 47 S. Ct. 489. As we have seen, under the Montana statute the *administrative* proceeding is not complete until the court shall have acted in *revision and correction* of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We cannot so read the act in the absence of clear and unambiguous phraseology requiring that course, or of a decision of the state court so construing it." (Italics ours.)

Under Montana law (Sec. 3906) the function of the state court with respect to orders of the Public Service Commission is solely judicial,—it prohibits the courts of that state from exercising legislative functions. The courts of the state under Section 3906, may only "vacate or set aside" Public Service Commission rate orders; they cannot modify them. We understand counsel for the appellees concedes the courts of Montana act only in a judicial capacity and in no sense do they exercise legislative functions with respect to such rate orders.

Therefore, the rule of the *Prentis case* (*Prentis v. Atlantic Coast Line,* 211 U. S. 210,) and similar cases does not apply with respect to litigation involving rate orders of the Public Service Commission of Montana.

The *Porter case,* was a *"Prentis case."* The instant suit is not a *"Prentis case."*

Apparently in the *Porter case,* it was not denied with respect to state court review of administrative action of the sort involved in *that case* the courts had some measure of legislative function. In this respect there

is a clear distinction between the *Porter case* and the case at bar, for it is definitely established the Montana courts exercise no legislative function in connection with their examination of orders of the Public Service Commission of Montana.

The *second point* to be specifically noted in the *Porter case,* is the ruling with respect to the availability of supersedeas under the Montana law there involved.

The court says that if a litigant will suffer irreparable harm by reason of an administrative order, in the absence of a stay, and *the state law does not afford such a stay, then there is a denial of due process,* and cites in support thereof, *Pacific Telephone and Telegraph Company v. Kuykendall, post.* We quote from the decision in the *Porter case* in that respect, as follows (286 U.S. at p. 470-471).

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 454, 60 L. Ed. 1084, 1098, 36 S. Ct. 637. *But where either the plain provisions of the statute* (Pacific Telephone and Telegraph Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68. L. Ed. 975, 980, 981, 44 S. Ct. 553) *or the decisions of the state court interpreting the act* (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353) *precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases*

> *where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.*" (Italics ours.)

But, the court says in the *Porter case,* under Montana law *there is provision for supersedeas* under the general procedural statutes of Montana there involved.

The section of the Montana law involved in the *Porter case* and relating to appeals from the state officer who had revoked the Syndicate's license (Sec. 4038) provided that such appeals might be taken under the general laws of the state relating to appeals. By the express provisions of those general laws an injunction *pendente lite* could be had.

Section 4038 of the Montana Code provided in part:

> "The rules of pleading and procedure in such action shall be the same as provided by law for the trial of equitable actions in the district courts of the state."

The general law, (Sec. 9243, ante) with respect to the trial of equitable actions provided for supersedeas.

Section 3906, here in question, is complete in itself, —both with respect to the judicial, as distinguished from legislative functions of the state court and with respect to supersedeas or stay. Neither Section 3906 nor any other section of the Public Service laws of Montana authorize or contemplate a resort to other or general laws for appellate or injunctive relief pending appeal. It is the sole authority of the Montana courts with respect to orders of the Public Service Commission.

It will thus be seen the *Porter case* is inapplicable to the situation here upon both grounds upon which it was decided, namely:

(a) in the *Porter case* the laws of Montana *authorized* the state courts to exercise legislative functions, whereas in the instant suits the state courts are *denied* the exercise of legislative functions;

(b) in the *Porter case* there was express *provision for supersedeas* or stay pending *final determination* in the courts of the state, whereas in the instant suit there is an express provision of the only applicable law (Sec. 3906) *denying supersedeas* or stay pending final determination.

(C)

Constitutionality of Section 3906, Montana Revised Codes—1921

The Statutory Court, in speaking of the decision in *Porter v. Investors' Syndicate*, ante, said (12 F. Supp. at p. 953), that that decision:

> "*is a plain direction to hold such a law* as we have been considering in Section 3906, denying a supersedeas or stay, *unconstitutional and void,* as violative of the provisions of the Constitution of the United States, for the reason, that it would permit the taking of the property of the complainant without due process of law, which is contrary to the Fourteenth Amendment."

We believe the Statutory Court was in error in its interpretation that the Porter case was a "direction" to that court to hold section 3906 unconstitutional. On the contrary, the court in the Porter case, in discussing the constitutionality of Section 4038 of the Montana Blue Sky Law said, (286 U. S. 470-471):

> "*But where either* the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall,* 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980,

901, 44 S. Ct. 553) *or the decisions of the State Court interpreting the act* (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 553) *precludes a supersedeas or stay* until the legislative process is completed by the final action of the reviewing court, due process is not afforded, *and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified.*" (Italics ours.)

Assuming for purposes of argument, that counsel for the Commission had some measure of authority to confess the invalidity of Section 3906, there would still remain a serious question as to what the Supreme Court of Montana would say in that respect. In other words, that court might well follow the rule announced by the Supreme Court of California to the effect that the legislature has power under the state constitution to deny injunctive relief.

Sprecles v. *Sugar Company*, 49 Pac. 353;
Wright v. *Superior Court*, 73 Pac. 145;
Barnett's Estate, 275 Pac. 453.

This court has indicated that such a determination is purely a question for the state courts.

Gasquet v. *Lapeyre*, 242 U. S. 367.

Justice Brandeis in his dissenting opinion in *Traux v. Corrigan*, 257 U. S. 354, 374 et seq, in discussing the right of a state to provide or deny injunctive relief, says:

"A state is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but also, by what process legal rights may be asserted, and in what courts they may be enforced. * * * As a state may adopt or reach trial by jury

* * * or, adopting it, may retain or discard its customary instances * * *. As a state may grant or withhold review of a decision by appeal * * * so it may determine for itself, from time to time, whether the protection which it affords to property rights through its courts shall be given by means of the preventive remedy or exclusively by an action at law for compensation.

"*Nor is a state obliged to protect all property rights by injunction* merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly inadequate. This, of course, whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused, and the injured party left to such remedy as courts of law may afford.

Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain action libels * * * in the interest of personal liberty that ordinarily refuses to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service * * *. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights * * * and have refused to interfere with the operations of the Police Department. * * * *Instances are numerous where protection of property by way of an injunction has been refused solely on the ground that serious public inconven-*

*ience would result from restraining the act complained of * * *.*" (Italics ours).

After mentioning other similar circumstances, Justice Brandeis continued:

"Such limitations upon the use of the injunction for the protection of private rights have ordinarily been imposed in the interest of the public by the court, acting in the exercise of its broad discretion. But in some instances the denial of the preventive remedy because of a public interest deemed paramount have been *expressly commanded by statute.* Thus, the courts of the United States have been prohibited from staying proceedings in any court of a state (Judicial Code, Sec. 265): and also from enjoining the illegal assessment and collection of taxes * * *.

"*What Congress can do in curtailing equity power of the federal courts, state legislatures may do in curtailing equity powers of the state courts,* unless prevented by the constitution of the state. In other words, states are free since the adoption of the fourteenth Amendment as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, but which, in the interest of the public, and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society." (Italics ours).

(The use of asterisks in the foregoing quotations from Justice Brandeis' opinion indicate omission of the decisions and statutes there cited.)

The language quoted last above should be a complete answer to the contention which we understand will be

made on behalf of the Montana Public Service Commission in the case at bar, to wit: that if Montana law denies a stay it is to that extent invalid and that Montana courts have power to grant a stay.

In *Pacific Tel. & Tel. Co.* v *Kuykendall,* 265 U. S. 196, this Court said: (p. 205)

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the State tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity,* and *is not required to establish* that the *State statute is not invalid under the State Constitution. Dawson v. Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case." (Italics ours).

In *Union Pac. R. Co.* v. *Weld County,* 247 U. S. 282, the Court said: (p. 287)

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. *The question is purely one of State law,* and, so far as we are advised, the supreme court of the State has not passed on or considered it. *A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.* On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, *the situation is not one in which cognizance of the present suit properly can be declined.*" (Italics ours.)

It was not incumbent upon appellants to bring a

suit in the state courts, testing the validity of Section 3906, ante, as a prerequisite to a resort to the federal court for protection.

It cannot be charged that appellant in this case purposely sought to avoid jurisdiction of the state's courts, by resort to the Federal courts for any reason of policy, when there is taken into account the abortive valuation and rate order involved, and briefed and discussed at some length in the application before this court for a stay. If there ever was a case, which upon its merits would appeal to the equity of any court, the merits of this case bring it within that category.

In other words, appellant resorted to the Federal court because it was the only place where it had any assurance of receiving that plain, speedy and adequate remedy which the constitution of the United States contemplates and guarantees.

See Corporation Commission of Oklahoma v. *Carey,* 296 U. S. 452.

(D)

The Decision in Pacific Telephone and Telegraph Company v. Kuykendall, 265 U. S. 196, and Corporation Commission of Oklahoma v. Carey, 296 U. S. 452, State the Rule Applicable Here.

We respectfully request the indulgence of the court in a review of the facts and law involved in the *Pacific* case.

The facts of the *Pacific case,* ante were these. The Pacific Company filed its Bill in the Federal District Court to enjoin the Department of Public Works of Washington from interfering with the collection of

increased telephone rates filed with the Department, and the application of which was denied after hearing and order. The three judge court set aside the temporary restraining order issued by the District Judge on the filing of the Bill, and denied the application for temporary injunction. Upon a direct appeal, this court reversed the three judge court. After an appeal had been taken as stated from the dispostion of the matter by the three judge court, a single District Judge heard the case on a motion to dismiss the Bill, and granted the motion, and from this dismissal a second appeal was taken, and consolidated with the first appeal.

In examining the decision in the *Pacific case* supra, it must be borne in mind the court is dealing with two sorts of review procedure under the Washington Public Service Commission law. Sections 10428 and 10424 (Rem. Rev. Stat.) were treated as dealing with the special procedure for review of rate orders. Examining Sections 10428 the court said (265 U. S. at p. 200):

> "By the statutes of Washington (Rem. Com. Stat. 1922 Sec. 10428), any complainant affected by any order of the commission (now the Department), may, within thirty days, apply to the superior court of the proper county for a writ of review 'for the purpose of having its reasonableness and lawfulness inquired into and determined.' The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the commission for further action. *It is clear that the function to*

> *be performed by the superior court under this section is judicial.* It does not fix *rates* or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the commission, and is to determine whether evidence which should have been received was rejected, and, in that case, is to send the case back to the commission for a new order. *The court does not act legislatively.*" (Italics ours.)

Examining Section 10424 the court found that this provision denied a stay in a *rate* proceeding, and in discussing the effect of Sections 10428 and 10424 said (p. 201):

> "*It is apparent from these provisions that after the commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service.* It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the Federal constitutional question, the Federal court of equity was available to it. The *state statute forbidding a stay* of proceedings until a final judicial decree was rendered, of course, *could not prevent a Federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required.* The conditions set out in bill, therefore, seem to have made a case ripe for Federal relief. Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Prendergast v. New York Teleph. Co., 262 U. S. 43, 48, 67 L. ed. 853, 857, 43 Sup. Ct. Rep. 466." (Italics ours.)

The court next examined Section 10441 (Rem. Rev. Stat.), which was at that time the provision for *val-*

uation procedure and review, and with respect thereto held as follows (p. 202):

> "It is clear that the function of the courts in fixing the *valuation* of the property of the public utility is not confined to a judicial review of the work of the commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445.
>
> "It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy to secure a change in the valuation of the property by the superior and supreme courts of the state is correct, and that resort to them to change the *valuation* would be no bar to a resort to a Federal court of equity to enjoin the enforcement of rates based upon such valuation after it had been approved by the state courts. It was on this ground that the district court held, both on the application for a temporary injunction before the three judges and upon the final dismissal, that the bill was premature, and could not be brought until after the final confirmation of the valuation by the state supreme court."

Under a state law terminating the legislative process with respect to *rate* proceedings with the determination of the regulatory body, but continuing the legislative process in the state court with respect to *valuation* proceedings, this court found no difficulty in holding that a bill in the Federal court was not premature by reason of failure to exhaust state remedies.

With respect to the legislative function of the courts of the state of Washington under the preview of Section 10441 (*valuation*), it was argued by the Pacific

Company that the constitution of the state of Washington does not authorize the state legislature to vest the state courts with legislative power to fix *rates,* and that therefore after the Commission had fixed the valuation, further court procedure in fixing valuation would be void.

This Court declined to pass upon this contention, saying in effect, that it could put its decision upon other grounds. *The Attorney General appearing for the Department contended (according to the decision) that the courts of Washington have inherent power to grant supersedeas, and that Sections* 10429 *and* 10424 *construed to prohibit supersedeas would be invalid.* The court likewise declined to enter into this controversy and said (p. 205):

> "A litigant whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the *effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state Constitution.* Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 296, 65 L. ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case."

In the following additional cases, namely, *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, and *Love* v. *Oklahoma Operating Co.,* 252 U. S. 331, it is evident the state statute providing for a review of commission orders was there conceded to be unconstitutional, or it was so intimated or so treated, but, notwithstanding such fact, this Court upheld the right of the complainant to proceed directly in the lower federal

court. Complainant was not subjected to the burden of inventing a remedy nor to the burden of delay while his opponent worked out a dilatory review. The opinion of the Court in each of these cases shows that the question was present in the minds of the court without being resolved along the line contended for by counsel for the Commission.

That these matters with respect to the validity of Washington law in vesting the courts of that state with legislative functions with respect to *valuation* orders, and that the courts of Washington have inherent power to grant supersedeas notwithstanding Sections 10429 and 10424, were actually in the case and considered by the court (although the court refused to regard them as determinative) is shown by the following quotations from the brief of the attorney general. In that brief the attorney general makes the following contention at page 15:

> "Washington state courts have legislative authority in reviewing the order of the Department of Public Works here complained of."

In this portion of the brief he considered Section 10424 (rates) and Section 10441 (valuation) together and reached the conclusion that the Washington courts did have legislative power in a situation such as that presented in the *Pacific case.* He further contended, at page 22, that:

"Section 10441 Rem. Comp. Stat. is constitutional," basing his argument upon the citation of Washington cases he further contended, at page 27 of his brief, that:

"If Section 10441 Rem. Comp.. Stat. is unconstitu-

tional, it should be first so declared by the supreme court of the state of Washington."

On page 34 of his brief he commences an argument on the following point:

> "The supreme court of the state of Washington has inherent power to suspend an order of a lower tribunal by virtue of Article IV, Section four of the constitution of the state of Washington."

As previously indicated the court in effect declined to consider the contention of either party on these questions of state law and based its decision squarely upon the following, (p. 204):

> "In the case before us, the company is shown by the averments of its bill to be *suffering daily from confiscation under the rates to which it is now limited. It has done all it could to get relief, and cannot get it.* The rates here in question were in force for more than a year, the company advanced them, the old rates were reinstated by the Department of Public Works. In such a case, then, there was no chance for a stay. By Sec. 10429, (Rem. Comp. Stat. 1922) the pendency of any writ of review does not of itself, stay or suspend the operation of the order of the commission, but the superior court may suspend the order; but no order suspending an order of the commission relating to rates, etc., can be made unless the court finds that great or irreparable damage would be done to the petitioner, and the section contains the following proviso:
>
> "'Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, *no supersedeas shall be allowed in any case from such*

order pending the final determination of the cause in the superior court, or, if appealed to the supreme court, by such supreme court.'

"Under such circumstances comity yields to constitutional right, *and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal court of equity from suspending the daily confiscation, if it finds the case to justify it.* Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 293, 67 L. ed. 659, 662, 43 Sup. Ct. Rep. 353.

"In such a case the Prentis case has no application. Love v. Atchison, T & S. F. R. Co., 107 C. C. A. 403, 185 Fed. 321, 324, 325." (Italics ours.)

From the foregoing analysis it seems apparent the *Pacific case* was a much more difficult case from the standpoint of exhaustion of state remedies than the case at bar, and that the *Pacific case* must determine the case at bar irrespective of the *Porter case*. It is also apparent a major consideration in the application of the *Pacific case* is the factor of daily confiscation.

The record here clearly establishes such daily confiscation by reason of the application of the reduced rates ordered by the Montana Public Service Commission.

As the record here shows the Company applied to the Commission for a rehearing (R. 22) and a stay of the reduced rates, but in each instance its applications were promptly denied. (R. 24). Since the courts of the state cannot make new rates nor grant a stay, the appellant upon the filing of its suit in the federal court, had exhausted its remedy under state law, and stood subject to the imposition of severe penalties and the confiscation of its property.

The penalty for non-compliance with the Commission's orders is from one hundred to five hundred dollars per day,—each day's continued violation being a separate offense; (Sections 3888 and 3908 Revised Codes of Montana, 1921). The Attorney General of Montana is required by law to enforce the Public Service Commission rules and orders. (Section 3904, 3905 and 3910, Revised Codes of Montana, 1921).

The court in the *Porter case, supra,* in discussing its decision in the *Pacific case,* states the rule to be:

> "Where the plain provisions of the statute, precludes supersedeas * * * due process is not afforded and resort may be had to a federal court of equity."

In the opinion in the *Pacific case,* the case of *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296, is cited in support of the statement that the statute of Washington prohibiting a supersedeas pending the final determination of the case is presumed to be valid by the Federal Court. That was an equity case for an injunction to prevent the collection of taxes and the contention was made that there was a want of jurisdiction because of an adequate remedy at law by payment of the taxes and an action to recover. The court found that, in view of the statute and the decisions of the Supreme Court of Kentucky, there was a doubt whether the taxes, if paid, could have been recovered, and because of this doubt, the jurisdiction was sustained, the court said:

> "It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.'"

Union Pacific R. Co. v. *Weld County,* 247 *U. S.* 282; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 *U. S.* 413.

In the recent case of *Carey* v. *Corporation Commission of Oklahoma,* 9 F. Supp. 709, a three-judge court, in a gas rate case, entertained jurisdiction because the court was in doubt whether, under the Constitution and statutes of Oklahoma, provision had been made for a judicial review of such an order. The court, in the opinion, said:

> "The Johnson Act (Jud. Code, paragraph 24, (1) 28 USCA Section 41 (1) deprives the United States courts of jurisdiction of controversies of this type only 'where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' This court is unanimous in its opinion that whatever may be the eventual decision of the question so vigorously argued, it cannot now be said that there is a 'plain' remedy in the courts of the state.
>
> "We conclude, therefore, that *until the supreme court of Oklahoma determines* that the laws of the state afford a judicial review in some state court of an order of the Corporation Commission affecting rates chargeable by a public utility, *this court is not deprived of jurisdiction by the Johnson Act.*" (Italics ours.)

The decision of the Statutory Court in that case was affirmed in 296 U. S. 452.

Irrespective of the fact the Johnson Act was passed at a later date than the decision in *Pacific case, supra,* it specifically retains, rather than excludes, jurisdiction in the federal courts, of suits such as this.

The rule of the *Pacific case* has not been modified by subsequent decisions of this court. The *Porter case,*

reiterates the rule with approval. It was not modified by the Johnson Act. In fact, the Johnson Act, by the last exception therein, with respect to "plain, speedy and efficient remedies," carefully preserves the rule. Otherwise, the constitutionality of the Johnson Act would be in serious doubt.

Conclusion

These conclusions seem inescapable:

(a) The Montana statute denies appellant a "plain, speedy and efficient remedy" in the courts of that state;

(b) The Johnson Act does not divest the Federal Courts of jurisdiction in a confiscation case such as this, and in the presence of such a state law;

(c) The *Porter* case is not applicable;

(d) This is not a *Prentis* case;

(e) The rule announced in the *Pacific* and *Carey* cases is controlling;

(f) The decision of the Statutory Court should be reversed and that court directed to maintain in effect the existing impoundment of revenues and the bond, pending the hearing and determination of the application for interlocutory and permanent injunctions.

Respectfully Submitted,

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Dated August 27, 1936.